R-T-W Accommodation

Duty To Accommodate Injured Workers in the Workplace .....

Shared Responsibilities

March 2000

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Introduction

In its May 1998 response to the 1996 Statutory Review Committee Report on Workers' Compensation, government expressed general concern over employers' **duty to accommodate** injured workers. It's believed that the requirement of employers to accommodate injured workers should be strengthened so that injured workers can be better accommodated back into the workforce with their pre-injury employer. This paper focuses on that recommendation and is intended as a first step toward creating more opportunities for effective and safe Return to Work for injured workers.

What is Duty to Accommodate?

In various workers' compensation systems across Canada there is a trend to include a statutory requirement for employers to re-employ injured workers in some capacity. Mandatory re-employment provisions apply to employers under workers' compensation legislation in Quebec (since 1985), Ontario and New Brunswick (since 1990), P.E.I.[1], and Nova Scotia (since 1996). Recently, the B.C. Royal Commission on Workers' Compensation also recommended mandatory re-employment provisions.

These provisions flow from duty to accommodate principles outlined in human rights legislation and developed under the common law. Newfoundland amended its Human Rights Code in 1981 to prohibit discrimination on the basis of *physical disability*. There is, however, no specific requirement under the Newfoundland Code that employers have a duty to accommodate injured workers. Nor is there any indication - based on the *Report of the Newfoundland Human Rights*

[1] Right to re-employment in New Brunswick and Prince Edward Island is under the *Employment Standards Act*. Requires the worker to have been employed by the injury employer for at least one year before the employer duty to accommodate manifests.

Commission on Proposed Amendments to the Human Rights Code (December 10th, 1997) - that the Newfoundland Code will be amended to include such a provision.

Even though the Newfoundland Human Rights Code may not contain a specific duty to accommodate provision, the scope of the common law has evolved to increase employers' responsibilities to accommodate the needs of their workers. General human rights provisions throughout Canada require employers to accommodate injured workers through modified or alternate duties (in the event that return to their original job is not possible).

Charter of Rights and Freedoms

- Section 15, effective April 17, 1985, prohibits discrimination on the basis of physical disability for all Canadians

The Human Rights Code, 1988.

- Provincial and Territorial public sector employers
- Private sector employers
- Federal Government employers

Canadian Human Rights Act

- Federally regulated private sector employers.
- Business classes under s.91 of the Constitution Act 1867 - eg. Shipping, international transportation, aeronautics, broadcasting and banking.

Bona Fide Occupational Qualification

Every human rights statute has a general defence to employment (or re-employment) discrimination known as a **bona fide occupational qualification**. A bona fide occupational qualification may be described as a requirement which, viewed objectively, is reasonably necessary for the performance of the

job. Therefore, a limitation, specification, or preference of an employer, which otherwise would constitute discrimination, is permitted if it is based upon a bona fide occupational qualification.

Once a case of differential treatment on the basis of physical disability is confirmed, the onus is on the employer to prove that the limitation or employment rule which was imposed is a bona fide occupational qualification. The duty to accommodate issue must be dealt with in the context of the bona fide occupational qualification exception or defence.

Supreme Court of Canada's 3-Part Test

The Supreme Court of Canada has played an important role in outlining responsibilities regarding duty to accommodate. In September 1999, the Court outlined a *new* three-part test for determining whether, on a balance of probabilities, an apparently discriminatory standard established by an employer can be accepted as a bona fide occupational qualification. [See, British Columbia (Public Service Employee Relations Commission) v. BCGSEU (re: Meiorin), S.C.C., September 9, 1999.]

First, the employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose.

Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose.

Third, the employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Other Important Concepts from the Court

There are other possible legal defenses to allegations of human rights violations. In particular, three concepts have been addressed by the Court: *reasonable accommodation, undue hardship, and multi-party responsibility to accommodate.*

REASONABLE ACCOMMODATION

An employer is only required to take such reasonable measures to accommodate the special needs of an individual as will not amount to **undue hardship** for that employer.

UNDUE HARDSHIP

"Undue interference in the operation of the employer's business and without undue expense to the employer." (*O'Malley*) An appraisal of undue hardship would include such relevant factors as *"financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities."* (*Central Alberta Dairy Pool*)

MULTI-PARTY RESPONSIBILITY

Employers are expected to accommodate to the point of undue hardship, but unions are expected to assist - or, at the very least, not to hinder - the employer's efforts at accommodation and re-employment. (*Renaud*) The worker also has a duty to assist in securing an appropriate accommodation. The conduct of the worker must be considered in determining whether the duty to accommodate has been fulfilled.

Use of the term "undue" by the Court infers that some hardship is acceptable. The Court has been vague however with regards to limits of this responsibility. The Court also recognizes that variable results on a case-by-case basis will occur based on the size of employers' operations. The degree of flexibility an employer has regarding workforce or facility changes, for example, will influence the assessment of whether the cost of accommodation is undue.

Duty to Accommodate in Newfoundland

Workplace return-to-work strategies are not new in Newfoundland. In fact, many employers, unions and injured workers have partnered with the WHSCC to encourage and promote the adoption of return-to-work programs. The primary objective of these strategies is to return injured workers to employment with the injury employer as quickly and as safely as possible.

WHSCC Return-to-Work Programs

Retrun-to-Work with Pre-injury Employer
- Modified Work
- Ease back
- Trial work (assess capabilities)
- Work site modifications
- Alternate work
- On the job training

Return-to-Work with Another Employer
- Ease back to similar or new work
- Trial work (assess capabilities)
- Workforce Re-entry Assistance
- Work site modifications
- Alternate work
- On the job training

* WHSCC promotion includes individual cases, policy and programs, handbooks, seminars, internet, etc.

Over the last decade there has been a growing level of awareness, particularly among the province's largest employers, about the importance of early return to work. Many employers in the province have established injury prevention and disability management programs and have valuable experiences they can share concerning their accommodation efforts.

EaseBack Programs [Very Effective]

- ✓ Starts after maximum medical recovery
- ✓ About eight weeks in duration
- ✓ Gradual return to duties
- ✓ Tasks agreed upon by worker, employer & doctor
- ✓ Benefits continued by WHSCC
- ✓ No additional cost to employer

Many employers and unions have discovered significant by-products of these approaches including reducing the risks of injury and illness, retaining productivity, effectively using human resources and health care services, improving personal and financial security, lowering workers' compensation costs, improving workplace morale and avoiding adversarial relationships.

Workers' Compensation Cost Implications

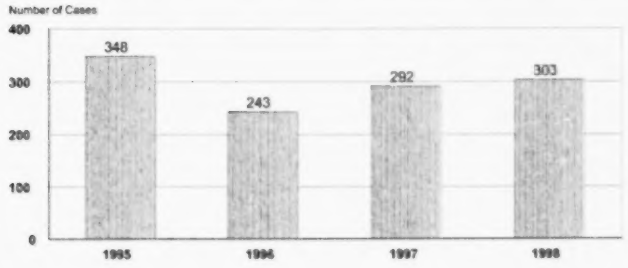
One of the debated issues surrounding duty to accommodate is the potential cost of accommodation imposed on the employer. Generally, employers perceive that the cost of accommodating injured workers is expensive, placing undue financial hardship on the organization or business. While that may be true in some cases, significant costs accumulate for all employers when injured workers are not returned to work.

Claim costs affect future compensation assessment rates for the injury employer (often acutely through programs such as experience rating and Worksafe) and all other employers as basic assessments are increased on the basis of collective liability. The lingering cost effects of cases where an injured worker does not return to work beyond the three year window in which an employer is *experience rated*, for example, are significant.

The average cost of establishing a capitalized reserve to fund long-term disability benefits on a claim is approximately $94,000 (indexed). The $94,000 is only the reserve necessary to fund future long-term disability benefits. When we factor in the costs of previous disability and other benefits, the total cost of failing to accommodate an injured worker is far in excess of $100,000. These large amounts are significant cost drivers which determine how much the WHSCC must collect from employers. As of December 31, 1998, long-term disability benefits represent 62% of the total benefit liability [$253 million of $408 million].

Workers who are not accommodated by the injury employer, or by some other employer, represent another potential case for long term disability. That resultant costs often far exceed the cost of any accommodation. Average annual savings could exceed $1 million when 10 fewer injured workers are effectively accommodated annually and prevented from falling into long-term disability. In 1998 alone, the WHSCC set up over 300 long-term disability claims.

Number of Long Term Disability Claims
(Extended Earnings Loss), 1995-1998



STRENGTHENING RETURN-TO-WORK ACCOMMODATION OBLIGATIONS	
PROS	**CONS**
• Positive treatment for injured workers • Positive long-term benefits for labour relations • Effective and early return to work strategies can be enhanced when the worker has job security • High preventative value, additional incentive for employers to reduce injuries • Reduce cost shifting and other practices which see the costs of long-term disability cases distributed across all rate groups and employers (the responsibility for cost avoidance goes to the injury employer) • Employers able to positively influence system costs, and create higher productivity • Legislative mandate would clarify roles and responsibilities between employers, unions, and workers	• Danger of re-injury if injured workers are returned to jobs which caused the injury without modification of the workplace • Possible short-term negative impact on labour relations • Increased legal costs (as in Ontario after 1992) • Escalating administrative costs • Reluctance or failure to pursue other job placements, retraining or other skill development of injured worker where, in the individual case, that may be more appropriate • Difficult to accommodate workers in small companies • Shifting employment patterns including varied contracts of service, part-time workers, virtual workforces, etc. • Difficulty in enforcing policy initiatives governing this matter. Can policy accomplish what Human Rights legislation and Supreme Court precedent has not?

Feedback

This discussion paper is being distributed widely to WHSCC stakeholders and is available to the public on request. The WHSCC is very interested in hearing from you.

How can we work together to put duty to accommodate principles into action? Do you have any ideas for policies or programs that might work? Government and the WHSCC are proceeding from the perspective that the status quo must be improved upon. What are our options? Even if not specific, you may wish to articulate a preferred direction (although you are welcome to be as specific as possible).

EMPLOYERS		WORKERS/UNIONS	
Positive	**Negative**	**Positive**	**Negative**
Incentive programs	Legislation[2]	Compensation rate incentives for return to work	Penalties
Rewards Rebates Subsidies	Penalties (Experience Rating/ Worksafe)	Programs and services	Collective Agreements
Education		Education	
Publicity for successful accommodation	Publicity for failure to accommodate	Publicity for successful accommodation	Publicity for failure to accommodate

You might wish to consider whether positive or negative approaches will work best. While the role of employers to accommodating injured workers is critical, it is clear from a reading of the law that the concept also has implications for coworkers and unions. We need to identify responsibilities, eliminate barriers and promote the human and financial benefits associated of Return-to-Work Accommodation.

[2] Legislation is not being considered at this time. See **Appendix** for legislative accommodation provisions under the Workers' Compensation Acts of other provinces.

Questions we would appreciate your feedback on

- Do current programs meet the needs of workplace parties?

- What are the current obstacles to effective return to work for injured workers?

- What are the roles and responsibilities of the following stakeholders in returning injured workers to work?
    A. Employer
    B. Injured Worker
    C. Union
    D. Coworkers
    E. WHSCC
    F. Health Care Providers

- What needs to be done to ensure that everyone carries out their roles and responsibilities effectively?

- Do you believe the injury employer has a greater responsibility to accommodate injured workers than other employers?

- What initiatives can be pursued to have the above stakeholders work more effectively in getting injured workers back to work?

- Are new programs required? What do you suggest?

Questions (Cont'd)

- Should existing or new programs include incentives for either employers or workers?
- What are the challenges for small businesses?
- Is the role of health care providers satisfactory?
- Should legislation enforce duty to accommodate?
- Should legislation outline the rights and responsibilities of workplace parties?
- Is it more important to educate stakeholders before developing new programs or implementing new laws?
- What guarantees should injured workers have that they will not be laid off after being accommodated?
- What is the role and responsibility of unions in helping injured workers return to the workplace?
- What needs to be done to protect the rights of co-workers who may be affected by the accommodation of an injured worker in the workplace?

How You Can Provide Feedback

We propose several options for your consideration.

- You can reply via **e-mail : *mrose@whscc.nf.ca***
- Or, reply through the feedback section on the WHSCC **Home Page**: ***www.whscc.nf.ca.***
- Or, **Mail** or **Fax** written comments to:

Corporate Policy and Research Department
Workplace Health, Safety and Compensation
Commission of Newfoundland and Labrador
P. O. Box 9000
St. John's, NF A1A 3B8
Fax (709) 778-1174

Response Deadline

The deadline for receiving responses is May 26, 2000.

Appendix

Canadian Jurisdictions With Mandatory Re-employment

Nova Scotia (effective Feb. 1, 1996)

- only applies to employers who regularly employ 20 or more workers (excluding the construction industry).
- only applies to workers who have at least 12 continuous months of employment with the injury employer and are injured on or after February 1, 1996.
- seasonal employment may be considered. Casual, short term and sporadic occupations are generally excluded.
- re-employment period: obligation continues until the second anniversary following the injury, or until the worker reaches age 65, whichever is earlier.
- refusal of re-employment by the worker alleviates further obligations of the employer.
- establishing the re-employment occupation:
  - first, pre-injury job is offered.
  - if not available, an alternate comparable job is offered (e.g. comparable in duties, function, earnings, qualifications etc.).
  - barring those possibilities, the employer *must* offer alternate work as it becomes available. The injured worker has priority placement.
  - mediation services provided.
- enforcement through penalties depending on cost of claim and additional penalties from $2000 to $10,000 may be levied.

New Brunswick (effective 1989)

- enforcement falls under ***Employment Standards Act***.
- worker must be employed by the accident employer for at least one year before the injury.
- employers with less than 10 employees are exempt.
- re-employment period varies - one year where 10-19 workers are employed, and two years if 20 or more workers are employed.
- there must be no loss of seniority or benefits and an employer cannot dismiss, suspend, lay off, penalize, discipline, or discriminate on the basis of the injury.
- re-employment is required in construction if the project and position exist at the time the worker is able to resume work.
- employer obligations are fulfilled where the worker refuses a suitable job.

Prince Edward Island (effective 1995)

- enforcement falls under ***Employment Standards Act***
- workers employed by the accident employer for at least one year must be re-employed.

Ontario (effective January 1990)

- employers of less than 20 workers are exempt.
- employer cannot dismiss, suspend, lay off, discipline, discriminate, or refuse to hire a worker because of a work injury.
- accommodation includes any and all actions that will respond to the needs of the worker, subject to the limitation of "undue hardship".
- workplace modification expenditures viewed as "investments" that can yield considerable long term financial savings, provide real help to injured workers, and prevent future disabilities.
- where workers cannot perform the essential pre-injury duties, employers are required to offer suitable employment that becomes available at the first opportunity.
- employers are required to make contributions for employment benefits for one year if the employee continues to pay his/her contributions.
- enforcement through penalties/fines based on average earnings of worker.

Quebec (effective 1985)

- worker's right to re-employment may be exercised within one year following the date of the injury in an establishment with 20 workers or less; and within two years in an establishment with more than 20 workers.
- reinstatement must be without loss of seniority or benefits.
- employer cannot dismiss, suspend, lay off, discipline or discriminate or refuse to hire a worker because of a work injury.
- special provisions apply to workers in the construction industry.